



would outweigh the ordinary presumption in favor of broad disclosure." *General Electric Capital Corp. v. Learn Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2003) (emphasis added). The Supreme Court interprets relevancy in the discovery context "broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc., v. Sanders*, 98 S. Ct. 2380, 2389 (1978). Simmons has not met its burden. The discovery regarding financial information sought by the State is clearly relevant to the punitive damages claims in this case, and Simmons fails to establish good cause for a protective order for that information.

One of the seven factors for a jury to consider in evaluating punitive damages under Oklahoma law is "[t]he financial *condition* of the defendant." See 23 Okla. Stat. § 9.1 (emphasis added). This Court has repeatedly held that discovery regarding a defendant's financial condition and net worth is appropriate when a claim for punitive damages has been made. In the *City of Tulsa* case, this Court held that "[i]t would appear that *financial statements* reflecting the Defendants' net worth from 1996 forward would be sufficient for the Plaintiffs' needs. . . . This order is without prejudice to Plaintiffs' re-urging the motion *should additional financial information be necessary* as the case progresses." (emphasis added).

The full financial statements that the State has repeatedly requested, including information on income and cash flow, and the notes that are "integral" to the financial statements, are clearly relevant evidence regarding Simmons' financial condition, a key element in the punitive damages analysis. Moreover, recent tax returns are also relevant to this analysis in that they are the data used and relied upon to prepare the financial statements and contain additional information that demonstrate how certain debt obligations are treated among related

entities and also contain information about how smaller private entities, such as Simmons, distribute profits.

Although Simmons' produced balance sheets in response to the State's request in mid-December, those balance sheets were incomplete and failed to include "accompanying notes [that] are an integral part of these financial statements." *See* Simmons Balance sheets filed *in camera*. By failing to produce information "integral" to the balance sheets, Simmons failed to fulfill its discovery obligations. Despite the State's multiple attempts to engage counsel to obtain complete copies of balance sheets including the integral notes, Simmons never responded to that request, or to the State's request for additional financial information. *See* Motion to Compel, Exs. F, G (Dkt #1868).

Citing *Anderson v. Boeing Co.*, 02-CV-196-CVM-FHM, 2005 WL 6011245, Simmons argues that the issue of the amount of punitive damages to be awarded is not a proper topic for expert testimony. Simmons' Motion at p. 6. However, *Anderson* is easily distinguishable from the instant case. In that case, the expert actually opined about the nature of and premise behind punitive damages. The State does not intend, nor has Mr. Payne opined on this type of information. The only testimony the State seeks to proffer through Mr. Payne is the financial condition of Simmons (and others), which inherently includes the ability of a defendant to bear the costs of a judgment. *See* 23 Okla. Stat. § 9.1.

Simmons further claims that the State seeks the additional documents for an improper purpose. Anticipating that Defendants would take the commonly held position that a plaintiff is not entitled to financial information until punitive damages are at issue in the case, and recognizing that the financial condition of companies changes over time, the State determined the most prudent course of action was to pursue financial information when it was time to

prepare for the damages expert deadline. Had the State asked for this information a year earlier, Defendants inevitably would have argued even more strongly that the request was premature, and the State would have had to then pursue updated information again late in 2008. Thus, the State approached Defendants about this outstanding discovery in October 2008 in anticipation of the January 2009 expert damages deadline. Strikingly, Simmons ignores the fact that the State attempted to obtain this information months before its expert deadline. Had Simmons provided this highly relevant financial information at that time, there would be no issue as to whether supplemental reports are appropriate. Obviously, the State had hoped that the materials sought by counsel would have arrived sooner and that they would have been complete. But they were not, and counsel has been nonresponsive since that time.

Finally, Simmons has put the cart before the horse by arguing against any supplementation of Mr. Payne's report. First, the instant dispute about the discoverability of the financial information must be addressed. If the Court compels production of additional financial information, then Mr. Payne will have to review that information. Once he reviews the information, *if* he determines that a supplement to his report is appropriate because the information previously provided by Defendants was incomplete or inaccurate, then the State will seek leave from this Court for such a supplement. However, unless or until those steps occur, the State does not know whether seeking leave for a supplement to Mr. Payne's report would be appropriate. Thus, whether or not a supplement from Mr. Payne is appropriate is an issue for another day.

Moreover, whether or not this Court will allow supplementation of Mr. Payne's report<sup>1</sup>, the State is entitled to the information sought in order to rebut any expert designated by Simmons regarding financial condition or to adequately cross examine Simmons' corporate witnesses regarding its financial condition. Mr. Payne is not the only vehicle for presenting evidence of financial condition of any given defendant to a jury.

For the reasons stated herein, the Court should deny Simmons' motion for protection and order Simmons to respond to the State's requests for information pertaining to its financial condition and to provide the specific documents delineated herein.

Respectfully Submitted,

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<sup>1</sup> Interestingly, even though Simmons has withheld complete information regarding its financial condition, it claims in footnote 3 of its Motion that Mr. Payne's methodology and analysis are in error and confirms what the State has suspected all along. Simmons will seek to exclude Mr. Payne's analysis even though it has given him incomplete information. This gamesmanship should not be allowed.

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